No. 15141

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARTHOLOMAE CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Opinion Below.

The District Court's opinion appears on pages 17-23 of the Transcript of Record (hereafter "R") and is reported in 135 Fed. Supp. 651 *et seq.* The findings and conclusions appear on R. 23-30.

Jurisdiction.

Jurisdiction of the lower court was invoked as to counts one [tort damage-negligence, R. 3-4] and count two [tort damage-*res ipsa loquitur,* R. 4-5] under Title 28, U. S. C., Section 1346(b). It was invoked as to count three [absolute liability for damage caused by non-negligent trespass through explosion, R. 5-6] under Title 28, U. S. C., Section 1346(a) and was invoked as to count four [inverse condemnation-intentional partial tak-

ing through partial damage, R. 6-7] under Title 28, U. S. C., Section 1346(a) and the Fifth Amendment to the Federal Constitution.

The judgment from which this appeal was taken was entered December 22, 1955 [R. 30-31]. Notice of appeal was timely filed February 16, 1956 [R. 31] and jurisdiction of this Court rests upon Title 28, U. S. C., Section 1291. Venue in the lower court was derived through Title 28, Section 1402.

Questions Presented.

1. Did the District Court err in failing to find that appellee was negligent?

2. Did the District Court err in failing to find that the test atomic explosions of October 22 and November 5, 1951, were the proximate cause of the damage to appellant's property?

3. Did the District Court err in failing to apply the doctrine of *res ipsa loquitur?*

4. Did the District Court err in adjudging that appellee was not liable to appellant upon the ground that the acts of appellee's agents were performed in the exercise of discretionary functions, within the exclusionary provisions of Title 28, U. S. C., Section 2680(a)?

5. Did the District Court err in concluding that appellee was not liable to appellant under the theory of absolute liability arising out of appellee's non-negligent trespass, through air shock waves caused by atomic explosions upon, and damage to, appellant's property?

6. Did the District Court err in adjudging that the damaging of appellant's property by appellee was not a taking of an interest in appellant's property for which appellee was liable under the provisions of the Fifth Amendment to the Federal Constitution and of Title 28, U. S. C., Section 1346(a)?

Statutes Involved.

The Fifth Amendment to the Federal Constitution. Title 28, U. S. C., Sections 1346(a), 1346(b), 2672, 2673, 2680(a), and 1402.

Title 42, U. S. C., Sections 1802, 1803(a)(3), 1803(a)(5), 1803(b), 1806(a)(1), 1810(a), 1810(b)(1), 1810(c)(1), 1812(a)(2), 1812(a)(7) and 1817.

Concise Statement of Case.

Appellant, a California corporation brought this action for damages, consisting of multiple cracking of the plastered walls and ceilings of four of the headquarters buildings on a large cattle ranch, owned by appellant. The damage was caused by two severe shakings of said buildings on October 22, 1951, and November 5, 1951, by air shock waves produced by the explosion of atom bombs at a test site in southwestern Nevada, known as Frenchman's Flat by employees of the Atomic Energy Commission, which test operations were exclusively under the control of appellee and almost all details thereof were classified as restricted and top secret to such extent that such details were not even disclosed at the trial.

In the record the explosions of atom bombs are frequently called nuclear detonations and Frenchman's Flat

or the test site is sometimes called the Nevada Proving Grounds.

Appellant's buildings were located about 150 miles northeast of the test site. There was a long valley between the two sites and no high mountains between them. The buildings were exceptionally strong in construction, with full length, deeply imbedded concrete foundations and heavier than average (for that area and type of use) framework. Detailed examination by an experienced building contractor (Norwood) on September 8, 1951, (44 days before the first impact by the shock waves from the atomic explosions) had disclosed that there was no settlement or cracking of the foundations of any of the buildings which were later damaged and that, with the exception of one ceiling crack in the Mess Hall (sometimes called the cook house) which had been repaired at some earlier date, there were no cracks in the walls or ceilings. Witness, Norwood, who testified orally at the trial, made such detailed inspection preliminary to commencing the construction of additional buildings for the ranch headquarters.

His testimony that there were no cracks in the plastered walls or ceilings, except the one in the Mess Hall ceiling *before* October 22, 1951, was corroborated by the deposition testimony of two witnesses who were residing at the headquarters from July 5, 1951 to July 15, 1952 and were physically present in the headquarters area at the times of the shakings (the ranch superintendent, Seale, and his wife).

The ranch headquarters was in a very isolated area—10 miles from a highway, 80 miles from the nearest railroad, not within any regularly travelled air flight line and there had been no earthquakes in the vicinity.

It was stipulated, that it was common knowledge within the area where the ranch headquarters was located that these test atomic bomb explosions were to be made and that they were to occur on October 22, 1951 and November 5, 1951.

The witnesses, Seale, testified (by deposition), without contradiction in the record, that these buildings were violently shaken during each of these explosions. Mr. Seale testified that the October 22nd blast caused a cattle stampede and Mrs. Seale stated that the November 5th shock threw her to the floor and that when she ran out of the office building she saw dust mushrooming up over the mountain to the southwest of the headquarters area.

The District Court made no finding as to the monetary value of the damage, but the undisputed testimony was that it amounted to $5,000.00 or more.

The Complaint is in four counts:

(1) Damage caused by negligent acts of appellee's agents performed in the course of their employment [R. 3-4].

(2) Damage caused by the inferred negligence of appellee's agents under the doctrine of *res ipsa loquitur* [R. 4-5].

(3) Damages arising out of a trespass upon appellant's property by air shock waves created by the non-negligent explosion of atomic bombs by appellee's agents acting within the scope of their authority—sometimes called absolute liability [R. 5-6].

(4) Damages for a partial taking of appellant's property through the intentional partial destruction thereof, for which an implied contract to pay arose under the Fifth Amendment [R. 6-7].

By answer, appellee denied all of the allegations of the complaint except that the Atomic Energy Commission was an executive agency. It made such denials upon lack of information or belief, except that it denied categorically the amount of appellant's damage [R. 8-10]. By amendment [R. 16] it pleaded the exclusion from consent to be sued in tort contained in Title 28, U. S. C., Section 2680, *as to counts one and two only.*

There was a Pre-trial Order [R. 11-15] in which it was agreed and found (a) that these atomic explosions were performed by appellant under the express mandate of the Congress [R. 12], (b) at or near an isolated, closely guarded and secret site[1] [R. 12]; (c) that these explosions caused air shock waves which could react into and rebound from atmospheric layer elevations which surround the earth [R. 12-13], and (d) that appellee knew on October 22, 1951, through previous experimentation, that these shock waves were capable of extreme,

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[1]Through inadvertence, which appellant's counsel has just discovered during preparation of this brief, the Pre-trial Order [R. 12], the lower Court's findings [R. 24] and decision [R. 17] all place appellants ranch north*west* of the testing site and such site south*east* of appellant's ranch. That the true directions are just the reverse is shown by the uncontradicted record and this Court's judicial notice. Mr. Millard's testimony and his numbers (1), (2) and (3) placed on Exhibit 1 show that the ranch is north*east* of the test site [R. 45-46 and Ex. 1]. Furthermore paragraph 2 of the Pre-trial Order locates the ranch in Eureka County, Nevada [R. 11] and paragraph 4 of such order locates the test site as 65 miles north*west* of Las Vegas, Nevada [R. 12] and Mr. Millard locates Ely, Nevada, as being 80 miles easterly of the ranch [R. 116]. This Court judicially knows that Ely and Eureka County, Nevada are located in the extreme North*east* portion thereof and that Las Vegas is located in south*west* Nevada.

erratic and uncontrollable destruction and property damage for which appellee had assumed liability in reports to Congress and for which Congress had appropriated funds for payment [R. 13].

All evidence as to what was done at the testing site, the directions given and discretion reserved in appellee's agents who were conducting the tests were through depositions of the appellee's witnesses, Cox, Fields and Graves. In substance, they testified that all acts were expressly authorized and *directed* and that those engaged in the operation at the test site had no discretion or authority to alter or vary the test explosions, except that they were permitted to make weather tests and direction of impact prognostications for the purpose of deciding whether time delay would better protect life and property *outside* of the test area and, if they so concluded, they could temporarily delay the performance of the test although they could not abandon it or change the constituent elements of the test.

They had full knowledge that they were using extremely high explosives; that a principal purpose was to test and develop them as military weapons in which the production of devastating shock waves was the most important element. They knew that these waves were erratic, almost uncontrollable and were capable of leapfrogging and reaching short and long distances and that they could not be contained within the test site area. They expected them to cause some damage outside of the test area but they did not know where and they hoped

the damage could be kept to a minimum. They expected that appellee would pay for such damage as was caused by the force of the explosions.

The then known and used method for predicting where the air-shock would go and its probable force, was to place instruments called microbaragraphs in particular directional locations from the test site and then make a pilot test explosion with a one ton explosive [R. 273]. Dr. Cox testified that he could compute very closely the pressure from any particular detonation for a distance up to 150 miles [R. 267-271] and Dr. Graves stated with given wind velocities and directions you could have a *focusing effect* of these shock waves for considerable distances; that such shock waves could be detected at great distances and once you start a shock wave going, it's going to go [R. 197-198].

But Dr. Cox did not place a microbaragraph to the *north* of the testing site nor did he graph the conditions to the *north* [R. 266] but he did place such instruments and make such studies to the east, west and south [R. 295-296].

As the trial court states in his opinion [R. 20-21] and as we shall state in our following argument, this, we believe was the *slight* negligence which is all that is required to support a judgment where the defendant is handling dangerous instrumentalities such as firearms or high explosives like atom bombs.

ARGUMENT.

I.

The Trial Court Erred in Failing to Find That Appellee Was Negligent.

The trial court found in part in Finding XV: "Upon the evidence before it, this Court cannot find that any officer or employee was negligent in the performance of his duties relating to atomic experimentation * * *" [R. 29].

This Court must reverse because such finding is clearly erroneous (Rule 52(a), Federal Rules of Civil Procedure).

The uncontradicted evidence was that Dr. Everett Cox was employed as a member of the Test Manager's organization as a specialist in blasts during the October-November series of 1951 [R. 248-249]. *Cf.* also Finding XI [R. 27]. Appellee's agents were dealing with the greatest explosive power then known—atomic bombs. In a report to Congress prepared and disseminated pursuant to an express mandate of Congress (Title 42, U. S. C., Sec. 1817) which was received in evidence as Exhibit 31, the Atomic Energy Commission (hereinafter called A. E. C.) reported (1) the air shock wave is the most important agent in producing destruction [Ex. 31, p. 85] a nuclear detonation releases tremendous energy, equivalent in a so-called nominal burst to approximately 20,000 tons of T. N. T. [Ex. 31, p. 83], the air shock wave is capable of severe destructive effects [Ex. 31, p. 83]. The Pre-trial Order [R. 13] stated that such waves were capable of extreme, erratic and uncontrollable destruction and property damage. The government report added "because of existing meteorological conditions, such as temperature and wind * * * (such) waves may affect things only

a short distance away in one direction, while affecting others miles away in another direction, or it may leapfrog certain areas and strike more distant ones" [Ex. 31, pp. 85-88; R. 201]. Similar statements appear in the report received in evidence as Exhibit 34 [pp. 10-13]. As Dr. Graves summarized it: "We knew that these shock waves could be detected at great distances; we had no reason to feel that we could confine any of these effects to your fifty miles, and it was clear once you start a shock wave going, its going to go" [R. 198]. He also affirmed that matters quoted from Exhibit 31 were known [R. 201].

It is undisputed, therefore, that appellee, through its agents, acting in the course of their duties, was experimenting with extremely dangerous and powerful firearms and explosives. In such cases "the standard of care required of the reasonable person when dealing with such dangerous articles is so great that a *slight deviation* therefrom will constitute negligence" (emphasis supplied) (*Warner v. Santa Catalina Island Co.,* 44 Cal. 2d 310, 317, 282 P. 2d 12). Such is the law of this circuit: *United States v. White,* 211 F. 2d 79, 87; and of Nevada: *Smith v. Smith-Peterson Co.,* 56 Nev. 79, 90, 92, 45 P. 2d 785, 790.

Negligence, of course, is a comparative term and may be active or passive (19 Cal. Jur., Negligence, par. 4, p. 549). It is to be determined with reference to the situation and knowledge of the parties and to all of the attendant circumstances (*idem,* p. 550; and *Cf. Nicora v. Cervera,* 49 Nev. 261 270, 244 Pac. 897, 900), and, since the duty to exercise care is proportionate to the danger which should be anticipated, liability attaches for a failure to provide against those occurrences which a

reasonably prudent man would anticipate (*idem,* p. 566) and this is true even though the danger arises out of negligence which concurs with an act of God (*Merrill v. L. A. G. & E. Company,* 158 Cal. 499, 504, 111 Pac. 534).[2]

Such being the law, we now examine the facts:

Dr. Cox and the other employees of appellee who constituted the Test team [R. 27, Finding XI] were dealing with very high explosives [Ex. 31, p. 83] which they knew, from previous conducted experiments, produced shock waves which were capable of extreme, erratic and uncontrollable destruction and property damage [Pre-trial Order, par. 7; R. 13]; they knew that this extreme destructive force could not be confined to the test area [R. 198]; that they would reach into and bounce back from various atmospheric layer elevations which surround the earth [R. 12-13, 200]; that once the waves were released by an explosion they were free from human control [R. 198]; and that they might travel either long or short distances, differing in different directions and that they might leapfrog so as to do both [R. 201].

But they also knew that this erratic conduct of the air shock waves was directly affected by wind velocities and

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[2]We do not cite Nevada law which would normally control (Title 28 U. S. C., Sec. 1346(b) "in accordance with the law of the place where the act or omission occurred") because we have found none which is applicable directly to *explosion and fire-arms* cases, We, therefore resort "to the general doctrines of accepted tort law, whence state judges derive their governing principles in novel cases" (*Britton v. Harrison Construction Co.,* 87 Fed. Supp. 405, 407.) However, *cf. Smith v. Smith-Peterson Co.,* 56 Nev. 79, 90, 92, 45 P. 2d 785, 790: "The degree of care of persons having possession and control of dangerous explosives, such as fire arms or dynamite, is of the highest".

directions [R. 197-198, 257-258] and by temperatures [R. 286, 289; *Cf.* Ex. 31, p. 86; Ex. 34, pp. 10-13], and although their authority to control or vary the tests was very limited [R. 193-195, 235-236] it was their duty to determine if the existing weather conditions "were, in fact, acceptable" [R. 193-194] they had the means to determine such conditions [R. 197-198, 273-275, 267-271] and the authority to delay the explosions until such conditions existed [R. 201; Ex. 34, p. 13]. They also knew that the effect varied *directionally* [R. 266; Ex. 34, p. 12] yet, although Dr. Cox had the means to test and graph the anticipated blast pressure to the *North* of the testing area (in the direction of appellant's property) he did not do so [R. 265-266, 295-296; Ex. 1].

Appellant, itself, summarizes what the test Organization (team) and Dr. Cox, particularly, could and should have done, had there been no negligence:

> "The Test Organization has a major safety program for anticipating where blast may strike. One item is the firing of high explosive shots prior to the nuclear test, with the blast being recorded on sensitive instruments in communities around the proving ground. If the weather remains constant these provide a good indication of where blast will strike, but if the atmosphere changes only slightly the blast may vary by miles. If strong blast is indicated for any community, the shot may be postponed." [Ex. 34, pp. 12-13.]

We repeat that the evidence *requires* a finding of negligence by appellee's employee, Cox, in the performance of his duty and that the trial court's apparently contrary finding as a part of Finding XV [R. 29] is clearly erroneous and must be reversed.

II.

The Trial Court Erred in Failing to Find That the Test Atomic Explosions of October 22 and November 5, 1951, Were the Proximate Cause of the Damage to Appellant's Property.

The trial court found in part in Finding XV: "upon the evidence before it, this court cannot find * * * that the atomic detonations were the proximate cause of damage to plaintiff's property * * *" [R. 29].

Again, this Court must reverse because such finding is clearly erroneous (Rule 52(a), Fed. Rules of Civil Procedure). The uncontradicted evidence was that before October 22, 1951, there were no cracks in the plastered walls or ceiling of the buildings where the cracks later occurred except the one crack in the mess hall ceiling which had been repaired at an earlier date [R. 56, 60, 66, 68, 130]. There was no rational basis or explanation for the immediate appearance of the cracks instantly following the explosions except as a direct result from the air shock waves caused by such explosions, since the appellant's evidence affirmatively excluded the possibility of their having occurred from (a) settlement of the buildings, (b) earthquake, (c) shaking from trucks on the highway, or (d) the rumble of a railroad train, or (e) air wave shocks from an airline. The evidence was that the buildings were exceptionally strong in their frame work and foundations [R. 127-130]; that there were no settlement cracks in nor changes in elevation of the foundations. In fact, the witness, Norwood testified "they definitely could not have been caused by settlement" [R. 133]. Had there been any cracks they would have been visible when Mr. Norwood inspected the property on September 18, 1951, because, as he testified "plaster repair cracks nor-

mally show, even though they have been painted over or repaired" [R. 135] and Mrs. Seale testified, without contradiction, that the condition of the building just before the first explosion occurred on October 22, 1951, was in the same condition as existed when Mr. Norwood inspected them on September 15, 1951 [R. 68]. There had been no earthquakes in the area during the months of October or November [R. 115-116], the nearest highway was 10 miles from the location of these buildings [R. 46] the nearest railroad was 80 miles away [R. 116] and the buildings were not within any regular air line flight [R. 117].[3]

Again, the description of what occurred by the witnesses Mr. and Mrs. Seale leaves no basis for any doubt that the only reasonable inference to be drawn is that the buildings were shaken and the plastered walls and ceiling cracked by the impact of the shock waves produced by the atomic explosions: "* * * just as we were about to go into the gate the blast went off, and the cattle whirled and ran to the back of the field to the fence * * * five or six men trying to stop them, but couldn't stop them until they got to the fence" [R. 54]. "I was sorting the ranch laundry and I had just gotten it started and just reached for a pencil off the desk when the shake came * * * it was intense enough it threw me into the laundry * * * at that time I did not know what

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[3]It is interesting to note that Dr. Cox could conceive of no other cause than the shock waves [R. 290-291].

it was. I knew we were going to have the atomic test. I got immediately up and ran out on the porch and looked around * * * and to the southwest could see the dust mushrooming up over the mountain" [R. 65]. We believe that this court take judicial notice of the fact that an earthquake does not produce dust whereas shock waves from an explosion would. The uncontradicted evidence is that immediately following such shakings the plaster cracks appeared for the first time [R. 56, 58, 66, 68]. While Messrs. Millard and Norwood did not see the cracks in the plaster until May 30, 1952 [R. 130] both Mr. Seale [R. 58] and Mrs. Seale [R. 68-69] testified that there was no change in the condition of the cracks between the dates of the explosion and the dates of such inspection, except that the cracks had widened some, and this evidence is uncontradicted in the record. And, of course, it was the cracked condition of the plaster which was the damage to Appellant's property [R. 136]. We, therefore, submit that the evidence points to no other rational conclusion that the air shock waives produced by the atomic explosions were a proximate cause of the resulting damage to Appellant's property and that the trial court's Finding XV as to lack of proximate cause [R. 29] is unsupported by the record and clearly erroneous which requires a reversal of its judgment.[4]

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[4]"* * * where no other cause intervenes between the original act or omission * * * producing the resultant damage, negligence of the first wrongdoer is to be regarded as the proximate cause of the injury". (*Smith v. Smith-Peterson Co.*, 56 Nev. 79, 94, 45 P. 2d 785, 791.)

III.

The District Court Erred in Failing to Apply the Doctrine Res Ipsa Loquitur.

The essence of this doctrine is that if the thing that caused the injury is under the exclusive control of the defendant and that which has happened is such as in the ordinary course of things would not have happened if those who had such control had used proper care, such facts afford inferred evidence, in the absence of explanation by the defendant, that the damage was caused by the defendant's ngligence. (*Union Pac. R.R. Co. v. De Vaney,* 162 F. 2d 24, 26 (9 Cir.); *Johnson v. United States,* 333 U. S. 46, 68 S. Ct. 391, 92 L. Ed. 468; *Nyberg v. Kirby,* 65 Nev. 42, 69-78, 188 P. 2d 1006, 1022 (citing Cal. cases); *Hospital Assn. v. Gaffney,* 64 Nev. 225, 233-237, 180 P. 2d 594, 600 (citing Cal. cases).)

Here the uncontradicted evidence is that the appellee was in complete control of the tests "* * * it was near an isolated, closely guarded and secret site * * *" [Pre-trial Order, Par. 4, R. 12]; that the activities were of such a nature that the full details of the directives and instructions were restricted and full disclosure was refused upon such ground [R. 226-228; Title 42, U. S. C., Secs. 1810(a), (b)(1).] Having laid the uncontradicted foundation that the buildings were extraordinarily strong in construction, that there had been neither curative cracks, temperature change cracks nor settlement cracks, the cracking of this plaster was of such a nature that it wouldn't have happened excepting through negligence on the part of Appellee's employees in conducting the test

atomic explosions. At we have already shown, appellee has made no rational explanation which would absolve it from negligence.

> "* * * because of the obvious difficulty of proof, a number of cases have aided the plaintiff by invoking the doctrine of *res ipsa loquitur* (citing cases)." (3 Okla. L. Rev., p. 25.)

Nor is it necessary that Appellant exclude every other possibility that the injury was caused other than by Appellee's negligence (although we believe Appellant has done so in this record.) (*Seneris v. Haas,* 45 Cal. 2d 811, 291 P. 2d 915.)

Appellee, as defendant in complete control of the isolated, secret test operation was required to meet or balance this inference of its negligence and, this it failed to do. (*Burr v. Sherwin-Williams Co.,* 42 Cal. 2d 682, 691, 268 P. 2d 1041.)

The law is clearly established that the doctrine of *res ipsa loquitur* applies to explosion cases. (22 Am. Jur., Explosions and Explosives, Secs. 95-96, pp. 212-214, and cases cited.) Furthermore the fact that Appellant proved some negligence by Appellee's agents does not foreclose application of this doctrine. (*Freitas v. Peerless Stages,* 108 Cal. App. 2d 749, 756, 239 P. 2d 671; *Roselip v. Raisch,* 73 Cal. App. 2d 125, 135, 166 P. 2d 340.) We submit that this is a case in which the doctrine was peculiarly applicable, and to refuse to apply it was reversible error.

IV.

The District Court Erred in Adjudging That Appellee Was Not Liable to Appellant Upon the Ground That the Acts of Appellee's Agents Were Performed in the Exercise of Discretionary Functions Within the Exclusionary Provisions of Title 28, U. S. C., Section 2680(a).

In paragraph I of its Conclusions of Law [R. 29] the District Court held:

> "That the activity here involved, the detonation of experimental nuclear devices, requires the exercise of discretionary functions within the meaning of the term used in Section 2680 of Title 28, United States Code, and sovereign immunity obtains for that reason."

Just as the facts in this case involve matters which have only begun to be considered by the Courts, judicial interpretation of Title 28, U. S. C., Section 2680(a) has changed materially between the date when the complaint within was filed and the date of this brief. At the time when the complaint was filed (Dec. 2, 1952) the *Dalehite* decision had not been made by the Supreme Court (*Dalehite v. United States,* 346 U. S. 15, 73 S. Ct. 956, 97 L. Ed. 1427), but it was decided before the trial. As a result, the trial court was considerably influenced by the following language in the *Dalehite* case (p. 36):

> "Where there is room for policy judgment and decision there is discretion. It necessarily follows that the acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."

However, as reported by the Fifth Circuit in *Fair v. United States,* 234 F. 2d 288, 291:

> "In the meantime the Supreme Court has rendered three decisions under which the reach and effect of the Act have been extended in keeping with the attitude it had expressed as early as the Yellow Cab Case in 1950. (U. S. v. Yellow Cab Co., 340 U. S. 543, 71 S. Ct. 399, 95 L. ed. 523.)"

The Fifth Circuit then goes on to cite and refer to *Williams v. United States* (350 U. S. 857, 76 S. Ct. 100, 100 L. Ed. 68) which reversed this court's decision reported in 215 F. 2d 800; the *Indian Towing* case (*Indian Towing Co. v. United States,* 350 U. S. 61, 76 S. Ct. 123, 100 L. Ed. 90) and the *Union Trust v. Eastern Airlines* case (*United States v. Union Trust* and companion cases, 350 U. S. 907; 76 S. Ct. 192, 100 L. Ed. 125). In the *Yellow Cab* case the Supreme Court said (p. 550):

> "the proceedings (in Congress) emphasize the benefits to be derived from relieving Congress of the pressure of private claims. Recognizing such a clearly defined breadth of purpose for the bill as a whole, and the general trend toward increasing the scope of waiver by the U. S. of its sovereign immunity from suit, it is inconsistent to whittle it down by refinement."

In the *Indian Towing* case the majority opinion had reversed the Fifth Circuit and held that such lower court had erred in finding the government immune from tort liability arising out of negligence at the operational level upon the ground that the activity was governmental and not of a kind which could be or was carried on by private individuals. The majority opinion directed attention to the fact that the liability in tort imposed by Title 28, U. S. C., Section 1346(b) was not "to the same extent

as would be imposed on a private individual 'under the *same* circumstances' but that the statutory language is 'under *like* circumstances.' "

While the facts involved in the *Indian Towing* case were such that the provisions of subsection (a) of Section 2680 were not directly involved, the four judges who dissented expressed their conclusion as to the intent of the majority in that decision as follows (p. 76):

> "The over all impression from the majority opinion is that it makes the government liable under the Act for negligence in the conduct of any governmental activity on the 'operational level.' It seems broad enough to cover all so-called 'uniquely governmental activities.' "

Referring to this statement in the dissenting opinion, the Fifth Circuit, in *Fair v. United States,* comments (p. 292):

> "It is further worthy of note that the minority in Dalehite, whose dissent was indicative of the desire to give broad extent to the Tort Claims Act, had become the majority in Indian Towing. A reading of the opinions and dissents in the two cases leads to the conclusion that Indian Towing represents a definite change in attitude on the part of the Supreme Court."

The Fifth Circuit then holds (p. 294):

> "The government is liable for the actions of its employees dealing directly with the public in the application of established policies, even if such employees are vested with a measure of discretion and such liability of the government for their acts and omissions in all of the respects mentioned is measured by the same rules as the local law applies to a private employer under like circumstances."

The Fifth Circuit then cites an earlier decision of the Eighth Circuit (*Dahlstrom v. United States,* 228 F. 2d 819) and says that said court in that case "rejected the idea that the government was protected by the exemption from the negligent exercise of discretion at the operational level."

In the *Dahlstrom* case, *supra,* the Eighth Circuit, after reviewing the foregoing Supreme Court decisions, stated that Title 28, U. S. C., Section 2680(a) should be interpreted as follows (p. 821):

> "When the government, at planning level, determines programs, plans, specifications or schedules of operations, it is exercising immune discretion and any activity pursuant to such plan does not give liability under the Act. But if the government, at the operational level, acts either contrary to the plan or in a manner not required by the plan, then the activity would not be discretionary and redress can be had for the resulting injury."

We believe that this summary and interpretation quoted from the *Dahlstrom* case is completely supported by the foregoing cited decisions and is the correct present interpretation of the Tort Claims Act, and, particularly, of the immunities provided for in Title 28, U. S. C., Section 2680(a).

Applying such interpretation to the facts disclosed in the record here, it is clear that the trial court has erred and that Appellee is not absolved from liability by said immunity section.

The evidence is conclusive that decisions made at *planning level* were mandatory and unalterable and those who actually conducted the operations in the field had *no discretion whatever* with respect to performance thereof.

Congress had both *authorized* (Title 42, U. S. C., Sec. 1806(a)(1)), and *directed* (Title 42, U. S. C., Sec. 1803(a)(3) and (b)) that these atomic bomb tests be made as experiments to develop military application of atomic energy. When Congress so provides government agents have *no* discretion (*Arenas v. United States,* 322 U. S. 419, 427, 64 S. Ct. 1090, 88 L. Ed. 1363).

General Fields testified: (1) that the primary object of these tests was military [R. 213], (2) that the number, type, expected yield and method of detonation of the shots and the amount of fissionable material to be used, were fixed at planning level [R. 221] and (3) could not be deviated from [R. 222, 234, 235]. He also testified that this was true of both tests here involved [R. 242] and that the discretionary authority of the Test Manager was no greater than that of an army truck driver who was operating under fixed instructions [R. 235-236].

Dr. Graves testified substantially the same [R. 190-191, 194-195]. Dr. Cox testified that the only discretion which the testing officials had, in the field, was to delay the test if weather conditions were unfavorable [R. 294].

It was the duty of those making the tests, at the *operations level,* to determine if weather conditions were acceptable [Graves, R. 193] and if they were temporarily unfavorable they could defer the test [Graves, R. 201; Field, W-9, R. 232; Cox, R. 294]. Testing of weather conditions was primarily the job of Dr. Cox [R. 284, 293-294] and he could have been very accurate had he used the equipment available to him [Cox, R. 267-271, 279, 306,

307], but not as to a particular direction if he had no station (microbaragraph) in that direction [R. 300-301].

In failing to place a microbaragraph to the north [R. 266] or to calculate (graph) the weather conditions and probable pressure of the explosions in that direction [R. 266], Dr. Cox was permitting a condition to exist where he could not predict or report the weather and wind conditions [R. 300-301] and this deviated from the direction and plan at planning level. This was negligence and was not the exercise of discretion which is excluded by Title 28 U. S. C., Section 2680(a). (*Dahlstom v. United States* (8 Cir.), 228 F. 2d 819, 821; *Somerset Sea Food Company v. United States* (4 Cir.), 193 F. 2d 631, 634; *Fair v. United States* (5 Cir.), 234 F. 2d 288, 294; and *cf.* Rogers, "Federal Tort Liability for Atomic Damage", Vol. 5, Journal of Public Law (1956), pp. 258 *et seq.* Emory University Law School.)

Certainly, the Congress has evidenced its opinion that the discretionary immunities of Title 28 U. S. C. Section 2680(a) do not apply to damages arising from these atomic explosion tests. First, it has approved and appropriated funds to pay this very type of claim pursuant to Title 28 U. S. C. Section 2672 [Pre-trial Order Par. 7-R. 13; Fields, R. 239-240; Ex. 38], and as General Fields testified, until this case arose, appellant had never rejected and disallowed such a claim upon the ground that the United States, through its agents, was exercising a discretionary function or duty [R. 241-242].

Also, in 1954, Congress increased the authority of the Atomic Energy Commission to pay money damages for

> "* * * bodily injury or damage to real or personal property resulting from any detonation, explosion, or radiation produced in the conduct of the Commission program for testing atomic weapons * * *".

increasing the limitations imposed by Title 28 U. S. C. Section 2672 from $1000 to $5000 (Title 42 U. S. C., Sec. 2207).

Certainly, one cannot suppose that Congress would make such provisions for payment of damages arising out of these unusual and extremely dangerous tests of the highest explosive forces produced by man if it was of the opinion that it had exempted the Federal Government from such liability by the provisions of Title 28 U. S. C. Section 2680(a). To the contrary, the Atomic Energy Commission has assumed that it incurred tort liability through its acts in exploding these atomic bombs and so reported to Congress and Congress has adopted its such construction by its appropriations (50 Am. Jur., Stats. Par. 337, pp. 328-330; *United States v. Freeman,* 3 How. (44 U. S.) 556, 564, 11 L. Ed. 724; *Polson Logging Co. v. United States* (9 Cir.), 160 F. 2d 712, 714-715.) Because of such error in holding that appellee was immune from liability, the judgment below must be reversed.

V.

The District Court Erred in Concluding That Appellee Was Not Liable to Appellant Under the Theory of Absolute Liability Arising Out of Appellee's Non-negligent Trespass, Through Air Shock Waves Caused by Atomic Explosions Upon, and Damage to, Appellant's Property.

In conclusion of law II the trial court states:

> "That plaintiff cannot recover on the theory of liability without fault, as such liability is precluded under the Federal Tort Claims Act."

We believe that it is only fair to the trial court to state that our definition "absolute liability" may have tended to mislead, although it is Hornbook law that the remedy to be applied is governed by what is pleaded and proved and not by how the pleading is entitled.

Basically, appellant pleaded and proved a trespass, accomplished by shock waves, into and upon its property, which damaged such property. The issue presented by *count three* is as simple as that. It has been almost universally held that damage by concussion is just as much a trespass as damage by trespass of a physical object:

> "In every practical sense there can be no difference between a blasting which projects rocks in such a way as to injure persons or property and a blasting which by creating a sudden vacuum, shatters buildings or knocks down people. In each case a force is applied by means of an element likely to do serious damage if it explodes * * *".
>
> *Exner v. Sherman Etc. Construction Company* (2 Cir.), 54 F. 2d 510, 514.

"* * * and it would make no material difference whether that damage, resulting proximately and naturally from the act of blasting by the defendant, was caused by rocks thrown against Mr. Colton's dwelling house or a concussion of the air around it, which had either damaged or entirely destroyed it."

Colton v. Onderdonk, 65 Cal. 155, 159, 10 Pac. 395, 397.

To the same effect, see:

Bedell v. Goulter (Ore.), 261 P. 2d 842, 844.

It is well established that the United States is liable for damages resulting from trespasses under the Tort Claims Act:

"Petitioners rely upon the word 'wrongful' * * * as showing that something in addition to negligence is covered. * * * Rather, committee discussion indicates that it had a much narrower inspiration, 'trespasses', which might not be considered strictly negligence."

Dalehite v. United States, 346 U. S. 15, 45-46, 73 S. Ct. 956, 972-973, 97 L. Ed. 1427, 1445;

Cf. United States v. Gaidys (10 Cir), 194 F. 2d 762, 765;

United States v. Praylou (4 Cir.), 208 F. 2d 291, 293, cert. den. 347 U. S. 934.

and although such cases, with the exception of Dalehite, deal with airplane accidents, such liability has been held analogous to the liability arising from explosives.

Parcell v. United States, 104 Fed. Supp. 110, 116, 3 Okla. L. Rev. p. 15; 13 Neb. L. Bull., p. 377.

The Court below relied upon the following passage from the *Dalehite* decision (346 U. S. 15, 44-45):

> "* * * there is yet to be disposed of some slight residue of theory of absolute liability without fault. * * * We agree * * * that the Act does not extend to such situations, though of course well known in tort law generally. * * * The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an 'inherently dangerous commodity or property', or of engaging in an extra-hazardous' activity. * * *
>
> "Petitioners rely on the word 'wrongful' though as showing that something in addition to negligence is covered. This argument, as we have pointed out, does not override the fact that the Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault; * * *".

But in the *Dalehite* case the factual situation was *different*. In that case "there was need for further experimentation with FGAN to determine the possibility of explosion" (pp. 37-38) and there was no "knowledge of a danger, not merely possible, but probable, (and) * * * the entirety of the evidence compelled a view that FGAN was a material that former experience showed could be handled safely in the manner it was handled * * *" (p. 42).

To the contrary, in this case, it was known that the atomic bombs would violently explode, causing shock waves to proceed in all directions and that the action of these

waves could neither be prevented or controlled and that they could do wide spread damage. As Rogers states:[5]

> "Even so, is *Dalehite* the proper case to be used as precedent? The factual situation in the atomic cases is markedly different. In *Dalehite* the evidence compelled a view that the explosive material was of a type that former experience had shown could be safely handled in the manner in which it was handled; thus, there was neither knowledge of nor intent as to the actual damage. In the atomic situation it was known that the bombs would explode violently, that the action of the shock waves could neither be prevented nor controlled and that they could do widespread damage; it was the purpose and intent of the experiments to determine the damage potential of the weapons being tested. Thus damage is clearly foreseeable in atomic explosions, but it was not foreseeable in the *Dalehite* situation."[5]

Of course, the evidence here has disclosed definite misfeasance through Dr. Cox's acts and omissions, but even if it had not this court judicially knows that shock waves would not have struck and damaged appellants property except as a result of negligence or misfeasance and, therefore, the rule of *res ipsa loquitur* will supply the missing direct evidence thereof.

We submit that the trial court's conclusion II is in error and must be reversed.

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[5]Rogers, "Federal Tort Liability for Atomic Damage", Vol. 5, Journal of Public Law (1956), p. 261.

VI.

The District Court Erred in Adjudging That the Damaging of Appellant's Property by Appellee Was Not a Taking of an Interest in Appellant's Property for Which Appellee Was Liable Under the Provisions of the Fifth Amendment to the Federal Constitution and of Title 28, U. S. C., Section 1346(a).

As conclusion III the trial court held:

> "That there was not a taking of the property of the plaintiff for a public use within the meaning of the Fifth Amendment to the Constitution of the United States."

This, we believe, was clearly erroneous. In fact, while we believe appellant should and will prevail in recovering from appellee for tort damage and for trespass damage, the facts in this case compel a conclusion that appellant's property was intentionally, partially destroyed and that such authorized, intentional, actions resulted in a partial taking for which it became liable under the Fifth Amendment and Title 28, U. S. C., Section 1346(a).

Here we have authorized, directed, mandatory and repeated acts [Title 42, U. S. C., Secs. 1803(a)(3) and (b), 1806(a)(1); R. 12-13, 25-29; Graves, R. 194-195, 199; Fields, R. 235-236] and while there was no intention to damage these particular buildings, there was express intention to do what was done with knowledge that it could not be controlled and that it might cause damage outside of the testing area and that, if it did, it would be compensated for [R. 13, 27, 28; Graves, R. 196, 198-199, 201; Field, R. 221, 238] and appellant's property was partially destroyed as a direct result thereof.

So far as we are informed this is a case of the first instance. No similar case has been brought against the United States and no case involving an implied taking through the means employed here has been tried or reported.

But under established principles of federal eminent domain law, there has been a taking for which the Fifth Amendment of the Federal Constitution requires the United States to pay:

1. Destruction, intentionally, by lawful authority and for public purposes, is a "taking."

United States v. Welch, 217 U. S. 333, 339, 30 S. Ct. 527, 54 L. Ed. 787, 789;

Duckett v. United States, 266 U. S. 149, 151, 45 S. Ct. 38-39, 69 L. Ed. 216, 218;

United States v. General Motors, 323 U. S. 373, 383-384, 65 S. Ct. 357, 362, 89 L. Ed. 311.

2. It is not necessary that the right "taken" be a recognized and defined real property estate, right or interest in order that it be compensable under the Fifth Amendment.

United States v. Land in Pleaston, California, 68 Fed. Supp. 279, 289;

Brooklyn Terminal v. United States (2 Cir.), 139 F. 2d 1007, 1011.

3. Here the taking (destruction) was a direct, to be anticipated, result of the shock waves. Hence the damages were directly and not consequentially caused.

United States v. C. B. & Q. R. R. (8 Cir.), 82 F. 2d 131, 136-137.

4. Such a taking by an authorized, executive agent of the United States creates an implied obligation of the United States to pay just compensation.

McGrath v. Cities Service Co. (2 Cir.), 189 F. 2d 744, 747.

It is the law that the intent required is an intent to do the thing which produced the taking, not a specific intent to take a specific interest in a specific property. If the Government act was authorized and the Government claimed no ownership right in the property affected, it is charged, in the same manner as a private citizen would be charged, with the *implied intent to do what it has done* and a "taking" has accrued.

United States v. Lynah, 188 U. S. 445, 464-465, 23 S. Ct. 349, 355, 47 L. Ed. 539, 546.

Here, the right asserted and "taken" is the right to repeatedly test high explosives which invariably produce shock waves which travel in all directions from the testing area and which are of such intensity that they have on one occasion (and may on other occasions in the future) reached and damaged plaintiff's property. This, as Justice Holmes has stated: "Generated the same claim as other forms of deliberate withdrawal of the property from the admitted owner." (*Keokuk Bridge etc. v. United States,* 260 U. S. 125, 126, 127.)

Furthermore, it is not the number of acts, but the character thereof, which determines whether or not there has been a "taking":

> "It is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking * * *. The taking by condemnation

> of an interest less than the fee is familiar in the law of eminent domain * * * and (when) it appears that less than the whole has been taken and is to be paid for, such a right or interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking."
>
> *United States v. Cress,* 243 U. S. 316, 328-329, 37 S. Ct. 380, 61 L. Ed. 746.

It is respectfully submitted that the evidence in this case contains all of the elements necessary to establish liability of appellee for a partial taking through intentional, partial destruction of appellant's property and for which there is an implied promise to pay, under the Fifth Amendment. Therefore, the determination of the lower court to the contrary is clearly erroneous and must be reversed.

Conclusion.

It appearing from the foregoing that the lower court has committed reversible error in each of the instances hereinbefore set forth and it further appearing that the uncontradicted evidence disclosed that appellant's property has been damaged in the sum of $5,000.00 or more [R. 136-137, 150-151] is respectfully submitted that the judgment of the lower court should be reversed *with directions* to enter judgment in favor of appellant and against appellee in the sum of $5,000.00 together with interest and costs.

Respectfully submitted,

Irl Davis Brett,

Attorney for Appellant.